

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOANNE HART and AMANDA)
PARKE, on behalf of)
themselves and all others)
similarly situated,)
Plaintiffs,)
-vs-) No. 1:15-cv-04804
BHH, LLC d/b/a BELL &) (WHP)
HOWELL and VAN HAUSER,)
LLC,)
Defendants.)

The deposition of PHILIP C. WHITFORD, Ph.D.,
called for examination, taken before GAIL LIVIGNI,
CSR No. 84-1965, a Notary Public within and for the
County of Will, State of Illinois, and a Certified
Shorthand Reporter of said state, at Suite 1100, 33
West Monroe Street, Chicago, Illinois, on the 12th
day of January, A.D. 2018, commencing at 9:30 a.m.

Pages 1 - 280

Page 11

| | | | |
|----|---|--|----------|
| 1 | A. | No. | 09:57:06 |
| 2 | Q. | Okay. Now, please take a look at | 09:57:08 |
| 3 | Exhibit 1. | Was this report signed by you? | 09:57:16 |
| 4 | A. | I don't recall having put a signature on | 09:57:24 |
| 5 | it. | | 09:57:28 |
| 6 | Q. | So the answer is no? | 09:57:30 |
| 7 | A. | It was transmitted by computer, so the | 09:57:32 |
| 8 | answer is no, I didn't have a means to sign it. | | 09:57:36 |
| 9 | Q. | Okay, thank you. And the same question | 09:57:40 |
| 10 | for Exhibit 2? | | 09:57:42 |
| 11 | A. | Same answer. | 09:57:42 |
| 12 | Q. | What is -- what was your assignment in | 09:57:44 |
| 13 | this case? | | 09:57:50 |
| 14 | A. | To read and evaluate the depositions, | 09:57:52 |
| 15 | the comments, rebuttal comments, and the actual | | 09:58:00 |
| 16 | data of tests and give my best appraisal of the | | 09:58:04 |
| 17 | validity or lack of validity of those tests. | | 09:58:14 |
| 18 | Q. | Are you an expert witness in this case? | 09:58:16 |
| 19 | A. | Yes. | 09:58:20 |
| 20 | Q. | Are you rendering opinions as to the | 09:58:22 |
| 21 | efficacy of the Bell & Howell test repellers in | | 09:58:28 |
| 22 | repelling and driving out rodents? | | 09:58:32 |
| 23 | A. | I am. | 09:58:34 |
| 24 | Q. | Are you rendering any opinions as to the | 09:58:34 |

1 through at the quiet setting, right? 11:10:30

2 A. Well, by definition, if I couldn't hear 11:10:32
3 anything on it, there is no sonic. 11:10:34

4 Q. Okay. Would you agree with me that the 11:10:38
5 word primarily would mean for the most part or 11:10:42
6 mainly? 11:10:46

7 MR. OSTOJIC: Object to form, foundation. 11:10:48

8 BY THE WITNESS: 11:10:52

9 A. That's its meaning. 11:10:52

10 BY MR. KOPEL: 11:10:54

11 Q. Okay. And by definition, right, if the 11:10:54
12 word primarily is there, that's implying that there 11:10:56
13 is something else there as well, right? 11:10:58

14 MR. OSTOJIC: Object to form, foundation. 11:10:58

15 BY THE WITNESS: 11:11:00

16 A. We often use words in our sentences to 11:11:00
17 add just a little more meaning or variation to them 11:11:06
18 which don't really have a substantive place in what 11:11:10
19 we're trying to say. Think of our president. 11:11:14

20 BY MR. KOPEL: 11:11:20

21 Q. So is it -- it's your belief that they 11:11:20
22 added the word primarily here for no reason? 11:11:28

23 MR. OSTOJIC: Object to form, foundation, may 11:11:32
24 call for speculation as to what the manufacturers 11:11:34

1 Q. And you've not seen test results 11:12:46
2 indicating whether or not sonic sound is present at 11:12:50
3 the quiet setting, have you? 11:12:54
4 A. I'm trying to remember whether Mankin 11:13:00
5 tested it, T-Pro or not. 11:13:04
6 Q. Mankin did not test it. 11:13:06
7 A. Okay, then I probably have not seen 11:13:06
8 that. 11:13:08
9 Q. Okay. Almost done with this document. 11:13:12
10 Okay. Can you please look at the 11:13:18
11 section here which says about ultrasonic and sonic 11:13:20
12 sounds? 11:13:24
13 A. Uh-huh. 11:13:24
14 Q. Do you see the second sentence says 11:13:26
15 ultrasound cannot travel through walls or closed 11:13:30
16 doors? 11:13:34
17 A. Uh-huh. 11:13:34
18 Q. Do you agree with that? 11:13:34
19 A. Closed doors is a good question. It 11:13:38
20 depends where the unit is placed. In my case, 11:13:40
21 there is an inch gap under the back door in my 11:13:46
22 hallway. It can get under that. You'd have to 11:13:50
23 have a securely sealed door to stop it. 11:13:52
24 Q. Okay. But you never -- I mean in the 11:13:54

1 since then have kept the same pattern. 11:58:38

2 Q. You know, without the data from 2010 or 11:58:42

3 other years, let's say -- 11:58:48

4 A. It would be meaningless. 11:58:50

5 Q. Okay, so let me just finish my question. 11:58:52

6 You're anticipating correctly. If you had only 11:58:54

7 looked at 2009 with the unit on and seen zero, it 11:58:56

8 would be a meaningless result, is that correct? 11:59:00

9 A. From a scientific standpoint, 11:59:02

10 absolutely. 11:59:04

11 Q. Why? 11:59:06

12 A. Because you have to have a control. 11:59:06

13 Q. And without a control, as a matter of 11:59:06

14 science, the data from a study is meaningless, is 11:59:14

15 that correct? 11:59:18

16 A. Pretty much so, yes. 11:59:18

17 Q. Can you please look at a portion of 11:59:32

18 this -- of the Transonic report titled, "Study 11:59:40

19 Design?" 11:59:44

20 A. Yes. 11:59:48

21 Q. I'm looking at the third sentence here. 11:59:54

22 It reads, "This unit was set to the medium volume 11:59:58

23 and spider setting on the options for sound output 12:00:04

24 for the test. I did not use the mice sound setting 12:00:06

1 since prior spiders tests had indicated mice 12:00:10
2 responded more strongly to the spider setting than 12:00:14
3 to the predesignated mice setting of the unit's 12:00:16
4 controls," do you see that? 12:00:20

5 A. I do. 12:00:20

6 Q. Okay. So during the course of your 12:00:22
7 testing with Transonic Pro when the unit was set to 12:00:26
8 on, was it set to the medium volume and spider 12:00:32
9 setting? 12:00:34

10 A. No, the medium volume is incorrect. 12:00:36
11 It's never been used where I could hear it which 12:00:38
12 means it had to be on the quiet setting. It has 12:00:42
13 never produced an audible sound for me. 12:00:46

14 Q. Is that an error in this report? 12:00:50

15 A. This is an error in that report. 12:00:52

16 Q. Can you turn back to the abstract, 12:00:54
17 please? You know, never mind. 12:00:56

18 Okay. So your initial and rebuttal 12:01:06
19 export reports, Exhibit 1 and 2, say that it was 12:01:14
20 turned to the quiet setting, whereas the study says 12:01:16
21 that it was turned to the medium setting, is that 12:01:20
22 correct? 12:01:24

23 A. That's what it looks like. 12:01:24

24 Q. And here the study you conducted, the 12:01:26